

DEC 23 1976

No. 76-646

MICHAEL ROEY, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

---

**BRADFORD SCHOOL BUS TRANSIT, INC., ET AL.,  
PETITIONERS**

**v.**

**THE CHICAGO TRANSIT AUTHORITY, ET AL.**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT**

---

**MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

---

**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

---

*In the Supreme Court of the United States*

OCTOBER TERM, 1976

---

No. 76-646

BRADFORD SCHOOL BUS TRANSIT, INC., ET AL.,  
PETITIONERS

v.

THE CHICAGO TRANSIT AUTHORITY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT*

---

MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

---

Petitioners (a private school bus operator and the Illinois School Transportation Association) brought this suit as a class action in the United States District Court for the Northern District of Illinois. They argued that respondent Chicago Transit Authority (CTA) had breached its contract with respondent Urban Mass Transportation Administration (UMTA) and had violated Section 164(b) of the Federal-Aid Highway Act of 1973, 87 Stat. 250, 281, 49 U.S.C. (Supp. V) 1602a(b), and Section 3(g) of the Urban Mass Transportation Act of 1964, as added, 88 Stat. 1572, 49 U.S.C. (Supp. V) 1602(g), by engaging in school bus transportation in competition with private bus operators. Petitioners also contended that UMTA improperly failed to enforce these contractual and statutory provisions.

The district court dismissed the complaint, holding that petitioners lacked standing to sue and that Congress had "clearly committed the decision as to whether a breach has occurred and whether or not to act on that breach to the agency's discretion" (Pet. App. A10-A11). The court of appeals affirmed; it rejected the standing and "committed to agency discretion" arguments but held that the dispute is within the primary jurisdiction of UMTA, to which it should be referred (537 F. 2d 943; Pet. App. A12-A22). The decision of the court of appeals is correct. There is no conflict among the circuits on this issue and no reason for review by this Court.

Last term, in *Nader v. Allegheny Airlines, Inc.*, No. 75-455, decided June 7, 1976, this Court thoroughly considered the principles underlying the doctrine of primary jurisdiction. Under *Nader* and earlier cases, an action otherwise within the jurisdiction of the federal courts should be decided first by the responsible federal agency when the issues involved present considerations of "uniformity in regulation" and "technical expertise." *Nader, supra*, slip op. 13. Such considerations are presented here.

This case involves two rather complex provisions of federal transportation law. These provisions require an agency receiving grants from UMTA to enter into an agreement with UMTA not to engage "in competition with private schoolbus operators." 49 U.S.C. (Supp. V) 1602a(b), 1602(g). Both statutes further provide:

This subsection shall not apply unless private schoolbus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards; and this subsection shall not apply with respect to any State or local public body or agency thereof if it \* \* \* was so

engaged in schoolbus operations any time during the twelve-month period immediately prior to [the dates of the respective statutes' enactments].

The grant agreement between UMTA and CTA reflects these exceptions to the non-competition clause.

Inquiries concerning the "adequacy" of transportation that could be provided by private bus operators, the "reasonableness" of their rates, their "conformance with applicable safety standards," and the prior engagement of the subsidized agency in "schoolbus operations" should first be made by UMTA in light of its experience. UMTA's preliminary consideration and determination of these issues is likely to result in a more consistent and systematic regulation of the schoolbus operations of subsidized transit agencies than would court decisions made in a vacuum without agency guidance. UMTA therefore should first resolve these matters administratively.

During the pendency of this litigation, but prior to the court of appeals' decision, UMTA promulgated regulations allowing "[a]ny interested party," including private bus operators, to challenge administratively the schoolbus operations of subsidized agencies. 41 Fed. Reg. 14130-14131, adding 49 C.F.R. 605.30-605.35. We are informed that petitioner Bradford School Bus Transit, Inc., has filed an administrative complaint pursuant to these regulations. This complaint raises the same substantive issues involved here. These pending proceedings offer petitioners a full opportunity to obtain a decision by UMTA concerning the challenged CTA operations.<sup>1</sup> If they should be dissatisfied with UMTA's

<sup>1</sup>Moreover, pursuant to recent UMTA regulations, 41 Fed. Reg. 14129, 49 C.F.R. 605.11, CTA will have to justify any future schoolbus operations, under the applicable statutes, when applying for federal grants.

decision, they then would be free to return to the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

DECEMBER 1976.